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Supreme Court of the United States

OCTOBER TERM, 1962

No 946

CHRISTOPHER MITCHELL, JOHN BAILEY, JOSEPH GERIDEAU, JAMES GILBERT BLAKE, ANDREW BROWN, ALVIN DELFORD LATTEN, FRED SMALL, CORNELIUS FLUDD, CHARLES BUTLER, FRANCIS JOHNSON, DAVID PAUL RICHARDSON, JOSEPH JONES, ALFRED HAMILTON, HARVEY GANTT, ALLEN COLEY, KENNETH ANDREW GERMAN, CAROLYN JENKINS, ARTHUREE SINGLETON, JENNIESE BLAKE, DELORES BROWN, ANNETTE GRAHAM, CECILE GORDON, VERNA JEAN McNEIL, MINERVA BROWN, PETITIONERS,

versus

CITY OF CHARLESTON, RESPONDENT

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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versus

CITY OF CHARLESTON, RESPONDENT

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT

On April 1st, 1960, at about 10:45 o'clock, a. m., Petitioners entered the premises of S. H. Kress & Company, a private business corporation, in the City of Charleston, State of South Carolina, and seated themselves at the lunch counter (R. 10, 11). The Petitioners were not served by S. H. Kress & Company and remained seated at the lunch counter until about 4:30 o'clock, p. m., when they were requested to leave the establishment by the manager, who had properly identified himself (R. 11). The request was

ignored, and was repeated a second time, but Petitioners continued to sit and refused to leave the premises (R. 12). Chief William F. Kelly then advised them that inasmuch as they had failed to comply with the request of the manager of Kress, it was necessary to place them under arrest (R. 24, 25). The evidence discloses that the City Police Department had received information that a bomb was going to go off in the Kress building (R. 21, 23). It was after this report was received that the Petitioners were told to leave the premises of Kress by the Management of Kress (R. 11, 23, 24).

Petitioners were charged with violating Title 16, Section 386, of the Code of Laws of South Carolina for 1952, as amended, and Section 33-39 of the Code of the City of Charleston for 1952.

Petitioners were tried before the City Recorder without a jury and found guilty of both charges and each sentenced to pay fines of Fifty ($50.00) Dollars or serve fifteen (15) days in jail on each offense; the sentences in each case to run concurrently (R. 61, 71) (Error at R. 56).

The judgments of the City Recorder were affirmed by the Court of General Sessions for Charleston County on June 26th, 1961 (R. 77).

The Petitioners appealed to the Supreme Court of South Carolina, which affirmed the judgment of conviction of trespass and violation of Title 16, Section 386, of the 1952 Code of Laws of South Carolina, as amended, and reversed the judgment of conviction for the offense of interfering with a police officer under Section 33-39 of the Code of the City of Charleston for 1952. The Supreme Court of South Carolina denied re-hearing on January 8th, 1962.

REASONS FOR DENYING THE WRIT

I

Petitioners committed criminal trespass on private property in South Carolina and were properly arrested and subsequently convicted, none of which violated their rights under the Fourteenth Amendment. That the interpretation given the Trespass Statute by the South Carolina Supreme Court is in accordance with the interpretation given historically in this country of similar Trespass Statutes.

The Petitioners were staging a so-called "sit-in", but they were not arrested for merely sitting, demonstrating or watching, or because they were Negroes. They were arrested only after the manager of a private business had asked them to leave the premises, and they failed or refused to do so. They thereupon became trespassers and were arrested and convicted as such. Petitioners apparently contend that they were engaged in the exercise of free expression by verbal and non-verbal requests for nondiscriminatory lunch counter service. The record shows that their actions were non-verbal, and the question of free speech is not involved. Petitioners also contend that the Statute under which they were charged is vague and indefinite in its terms and did not provide reasonable notice under which convictions could be obtained. In fact, every action of the Petitioners suggests that they intended and expected to be arrested for their actions and would, in fact, have been disappointed had they not been. They cannot under these circumstances complain that they had no notice.

The warrant for trespass states with particularity that the Petitioners commited a trespass "in that they did fail and refuse to vacate the premises of S. H. Kress & Company when ordered to do so, all in violation of Title 16, Section 386, of the Code of Laws of South Carolina for 1952, as Amended . . .". Certainly this language is un-

ambiguous and certainly the Petitioners could not have doubted the nature and cause of the accusations against them. Section 43-111 of the Code of Laws for South Carolina for 1952, which is applicable to Municipal and Recorders Courts, has not been interpreted so as to require technical accuracy in stating the offense. *Elletson v. Dixie Home Stores*, 231 S. C. 565, 99 S. E. (2d) 384; *McConnell v. Kennedy*, 29 S. C. 180, 7 S. E. 76; *McCall v. Alexander*, 81 S. C. 131, 61 S. E. 1106; *Duffie v. Edwards*, 185 S. C. 91, 193 S. E. 211; *State v. Randolph et al.*, 239 S. C. 79, 121 S. E. (2d) 349. Section 43-113 of the Code of Laws of South Carolina for 1952 provides that proceedings before a magistrate are summary in nature. Section 15-1561 of the Code of Laws of South Carolina for 1952 gives the Recorder of the Police Court of the City of Charleston all powers, duties and jurisdiction of a magistrate.

Petitioners are apparently attempting to raise the question as to whether the trespass conviction can stand under the facts proven, in view of the wording of the Statute which uses the phrase "after notice from the owner or tenant prohibiting such entry".

In *State v. Bradley*, 136 S. C. 465, 120 S. E. 244, South Carolina's highest Court stated as follows:

> "In *State v. Lightsey*, 43 S. C. 114, 20 S. E. 975, the presiding judge charged the jury: And on 'the land away from his castle he has not the same right there that he has in his home. . . . If a man warns another off his place, and that man comes on it (or refuses to leave, we add), he is guilty of a crime, a misdemeanor, and for that misdemeanor he may be tried in court'."

A unanimous Court stated unequivocally in the above quotation that if a man warns another off his place and that man refuses to leave, he is guilty of a crime, a misdemeanor. This view of our trespass statute is generally

followed where the question has arisen under similar statutes.

Our sister State of North Carolina, in *State v. Clyburn*, 101 S. E. (2d) 295, had before it the identical question involved here. The Defendants in the *Clyburn case* contended that the North Caroliaa statute had no application since it only made criminal an entry after being forbidden. The Court, following numerous previous decisions in North Carolina, held that one who remained after being directed to leave was guilty of wrongful entry, even though the original entrance was peaceful and authorized. The Court stated as follows:

> "Does the statute, G. S., Sec. 14-134, apply to such a trespasser? Defendants maintain it has no application since it only makes criminal an entry after being forbidden. The merit, if any, in the position taken is determined by ascertaining the wrong condemned. The denomination of the criminal act and the historic interpretation given to the words used to define the act provide the answer to the question. The statute, first enacted in 1866, is entitled 'An Act To Prevent Wilful Trespasses On Land, and Stealing Any Kind of Property Therefrom'. It is now grouped with other statutes relating to wrongs done to the owners of real estate in a sub-chapter of our criminal laws entitled 'Trespasses to Land and Fixtures'. Looking at the titles, it is apparent the Legislature intended to prevent the unwanted invasion of the property rights of another. *State v. Cooke, supra; State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424: It is not the act of entering or going on the property which is condemned: it is the intent or manner in which the entry is made that makes the conduct criminal. A peaceful entry negatives liability under G. S. Section 14-126. An entry under a bona fide claim of rights avoid criminal responsibility under G. S. Section 14-134 even though civil liability may remain. *State v. Faggart*, 170 N. C. 737, 87 S. E. 197; *State v. Wells*, 142 N. E. 590, 55 S. E. 210; *State*

v. Fisher, 109 N. C. 817, 13 S. E. 878; *State v. Crosset*, 81 N. C. 579.

What is the meaning of the word 'enter' as used in the statute defining a criminal trespass? The word is used in G. S. Sec. 14-126 as well as G. S. Sec. 14-134. One statute relates to an entry with force; the other to a peaceful entry. We have repeatedly held, in applying G. S. Section 14-126 that one who remained after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful and authorized. *State v. Goodson, supra; State v. Fleming*, 194 N. C. 42, 138 S. E. 342; *State v. Robbins*, 123 N. C. 730, 31 S. E. 669; *State v. Webster*, 121 N. C. 586, 28 S. E. 254; *State v. Gray*, 109 N. C. 790, 14 S. E. 55; *State v. Talbot*, 97 N. C. 494, 2 S. E. 148. The word 'entry' as used in each of these statutes is synonymous with the word 'trespass'. It means an occupancy or possession contrary to the wishes and in derogation of the rights of the person having actual or constructive possession. Any other interpretation of the word would improperly restrict clear legislative intent. The charge as given is the correct interpretation of the statute."

See also *State v. Avent*, 118 S. E. (2d) 47 (N. C.), page 53.

An annotation in 49 A. L. R., page 597, deals with the criminal offense of forcible detainer or trespass, where entry was peaceable, and states in part as follows:

"The few cases in which the question of the effect of a peaceable entry in prosecution of forcible entry or trespass has arisen, with the exception of a few earlier North Carolina cases hereinafter referred to, support the holding in the reported cases (*State v. Tyndall*, *ante*, 596) to the effect that although the entry on lands may be effected peaceably, and even with the permission of the owner, yet, if after going upon the premises of another the defendant uses violent or abusive language, and commits acts such as are reasonably calculated to intimidate or lead to a breach of the peace, he will be guilty of a forcible trespass."

While there is no abusive language present in the cases before this Court, the principle of notice after entry is relevant to the issue attempted to be raised by Appellants. Numerous cases are cited in the A. L. R. annotation from North Carolina, and the following Pennsylvania cases: *Cole v. Reece*, 47 Pa. Super. Ct. 212; *Com. v. Johnston*, 71 Pa. Super. Ct. 548. Also see 52 Am. Jur., Trespass, Section 84, page 895, where the following is found:

> "A mere invasion of private property without any disturbance of the peace is not a crime. On the other hand, although an entrance on land may be effected peaceably or even with the permission of the owner, a person making such entry may by reason of subsequent conduct while there be held guilty of a forcible trespass."

II

The Trespass Statute of South Carolina applies to all citizens equally, discriminates against no group or individual, is designed to protect property rights of all citizens of all races and does not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

The trespass statute under which Petitioners were arrested, tried and convicted is not racial in origin or in enforcement. It has been part of the statutory law of South Carolina since about 1866.

The Petitioners apparently seek in this case to avoid or ignore the well established principle that a private business has a perfect right to select its customers and to make such selection on any basis it chooses. *State v. Avent* (N. C.), 118 S. E. (2d) 47; *Williams v. Howard Johnson's Restaurant*, 4th Cir., 268 F. (2d) 845; *Slack v. Atlantic White Tower System, Inc.*, 284 F. (2d) 746; *Alpaugh v. Wolverton* (Va.), 36 S. E. (2d) 906. Such right is embraced within the broad rights which characterize the ownership of pri-

vate property. In denying to the Petitioners service at its lunch counter, it is true that S. H. Kress & Co. was voluntarily following a prevailing custom of racial segregation. By no means is Kress or any other business establishment required or compelled to follow such custom. It is, after all, a free choice, exercised by the owner of private property as a matter of right.

The record is clear that the Petitioners violated local custom by seeking service at the Kress lunch counter. However, they were not arrested by the City of Charleston for seeking such service. They were arrested after they refused to leave the private property of Kress. By their act of refusal and their failure to leave, they became trespassers, subject to arrest and prosecution under the trespass statute. The police were not enforcing a policy or custom of racial segregation. They were enforcing a criminal statute based solely on private property rights without regard to race, color or creed. The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment, and it has been so held repeatedly. *State v. Avent, supra; Williams v. Howard Johnson's Restaurant, supra; Williams v. Hot Shoppes, Inc.*, 293 F. (2d) 835.

The position of the City of Charleston has been perhaps best stated by the North Carolina Supreme Court in *State v. Avent, supra*, at page 54, where the Court stated as follows:

> "Private rights and privileges in a peaceful society living under a constitutional form of government like ours are inconceivable without State machinery by which they are enforced. Courts must act when parties apply to them—even refusal to act is a positive declaration of law—and, hence, there is a fundamental inconsistency in speaking of the rights of an individual who cannot have judicial recognition of his rights. All the State did in these cases was to give or create a neutral

legal framework in which S. H. Kress and Company could protect its private property from trespassers upon it in violation of G. S. Sec. 14-134 and G. S. Section 14-126. There is a recognizable difference between State action that protects the plain legal right of a person to prevent trespassers from going upon his land after being forbidden, or remaining upon his land after a demand that they leave, even though it enforces the clear legal right of racial discrimination of the owner, and State action enforcing covenants restricting the use or occupancy of real property to persons of the Caucasian race. The fact that the State provides a system of courts so that S. H. Kress and Company can enforce its legal rights against trespassers upon its private property in violation of G. S. Sec. 14-134 and G. S. Sec. 14-126, and the acts of its judicial officers, in their official capacities, cannot fairly be said to be State action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution. Such judicial process violates no rights of the Defendants guaranteed to them by Article I, Sec. 17, of the State Constitution. To rule as contended by Defendants would mean that S. H. Kress and Company could enforce its rights against White trespassers alone, but not against Negro trespassers, and White and Negro trespassers in company. Surely, that would not be an impartial administration of the law, for it would be a denial to the White race of the equal protection of the law. If a land owner or one in possession of land cannot protect his natural, inherent and constitutional right to have his land free from unlawful invasion by Negro and White trespassers in a case like this by judicial process as here, because it is a State action, then he has no other alternative but to eject them with a gentle hand if he can, with a strong hand if he must. Annotation 9 A. L. R., p. 379 quoted above; 4 Am. Jur., Assault and Battery, Sec. 76, p. 167; 6 C. J. S. Assault and Battery Sec. 20 (2). This is said in 4 Am. Jur., Assault and Battery, Sec. 76, p. 168: 'Even though the nature of the business of the owner

> of property is such as impliedly to invite to his premises persons seeking to do business with him, he may, nevertheless, in most instances refuse to allow a certain person to come on his premises, and if such person does thereafter enter his premises, he is subject to ejection although his conduct on the particular occasion is not wrongful.' . . . White people also have constitutional rights as well as Negroes, which must be protected, if our constitutional form of government is not to vanish from the face of the earth.
> This is said in an article designated 'The Meaning of State Action' by Thomas P. Lewis, Associate Professor of Law, University of Kentucky, and appearing in Columbia Law Review, December, 1960, Vol. 60, No. 8, in note 134, page 1122: 'State court recognition of the restaurateur's private discrimination could be in the form of denial of any action against him by an aggrieved party. A related issue is the ability of the state to enforce through arrest and an action for trespass the discrimination of the private owner. None of the interpretations of Shelley (*Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161) of which the writer is aware, except Professor Ming's, *supra* note 92 (Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases, 16 U. Chi. L. Rev. 203 (1949)) would extend it to this kind of case'."

No statutory or constitutional law, either of the State of South Carolina or of the City of Charleston, requires the segregation of races in public restaurants. Consequently, there is no violation present of the provisions of the Fourteenth Amendment which prohibit the states from making or enforcing any law abridging the privileges and immunities of citizens of the United States, or denying to any person the equal protection of the law.

The trespass statute of South Carolina is obviously designed to protect private property rights of all citizens, but it does not authorize State and City officials to control the management of a business or to dictate what persons

shall be served. As stated by the Supreme Court of the United States, in *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 842, 92 L. Ed. 1161:

> "Since the decisions of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first Section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

See also in this connection *Williams v. Howard Johnson's Restaurant, supra.*

While it is true that there is State action present to the extent of the enforcement of a trespass statute protecting private property rights, it is also true that this statute, by its long history and enforcement, is not concerned with racial differences or the perpetuation of segregation. It applies to a negro home and gives protection to the owner thereof, as it does to a white home and the owner thereof. It protects negroes' businesses from serving negroes, whites, redhead people, people of objectionable ages, or anyone else. To hold such a statute unconstitutional would result in chaos. Private ownership would be meaningless without the power to determine who shall stay and who shall go. A lessee of a small grocery store could not evict or have arrested a person who refuses to leave the premises when ordered. He would be left to his own devices, as the early American pioneers, with the consequent, inevitable violence.

Petitioners have cited numerous decisions, none of which, however, deal with the issue now before this Court.

The case of *Boynton v. Virginia*, 364 U. S. 454, 81 S. Ct. 182, is apparently relied on by Petitioners in support of their argument that the statute is unconstitutional, if

applied to a customer refusing to leave private business premises. However, this decision of the United States Supreme Court in 1960 involved the application of the Interstate Commerce Act of the United States. The majority opinion does not pass on any constitutional issue, including the issue raised by the Petitioners under the Fourteenth Amendment. The Court, however, did have the following to say:

> "Because of some of the arguments made here, it is necessary to say a word about what we are not deciding. We are not holding that every time a bus stops at a wholly independent roadside restaurant, the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that act."

Petitioners also cite *Shelley v. Kraemer, supra,* which is inapplicable, inasmuch as it involved the enforcement by a Court of racial restrictions. It was not necessary to prove Petitioners were Negroes to obtain a conviction for trespass. Their race or national origin was meaningless in the prosecution of the case.

Petitioners cite *Marsh v. State of Alabama*, 326 U. S. 501, 66 S. Ct. 276. However, Petitioners were not sitting on a company owned sidewalk or right-of-way which was freely accessible and the business block of a community shopping center. The *Marsh case* did not involve the rights of the owner of a private business within his establishment as does the instant case. Consequently, Petitioners' analogy is not proper, that the lessee or owner of a private business establishment must serve even one he does not wish to serve. The *Marsh case* must be limited to its particular facts, namely, a company owned sidewalk near a post office in a business block in a suburb owned by a shipbuilding corporation.

The Fourteenth Amendment does not deny a citizen the right to be racially prejudiced and racially discrimina-

tory. This, too, is a freedom that is protected. If Kress, in the exercise of its rights under the Constitution of the United States, determines to be racially discriminatory and determines to remove Negroes from its lunch counter, it certainly has such a right and must bear the economic results of such policy. After all, Petitioners were not arrested because they were Negroes, nor because they sat at a lunch counter, nor because they remained at the lunch counter for several hours. They were arrested and tried on a warrant sworn out by Kress for refusing to leave private property when requested to do so by the owner.

It has been said that freedom of speech is freedom for the speech that one abhors. It follows, therefore, that freedom of association and freedom to use property to serve or entertain those one wishes may be freedom some abhor, but, nevertheless, they are freedoms that are protected by the United States Constitution.

It should not be overlooked that although Petitioners may not have been served at 10:45 o'clock, a. m., because Kress was allegedly exercising racial discrimination, Petitioners were not requested to leave because of racial discrimination. They sat mute and unmolested for over five hours. The manager was advised of a bomb threat; all persons in the store, both white and colored, were requested to leave for this reason. Only Petitioners chose not to comply. Only Petitioners chose to remain. Only Petitioners chose to become trespassers. Only Petitioners chose to demand police action.

CONCLUSION

It is respectfully submitted that the Supreme Court of South Carolina decided all Federal questions in accordance with the applicable decisions of this Court and the Constitution of the United States, and the Petition for Writ of Certiorari should be denied.

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